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## Part A — Commentary

### 2.1 Introduction

This monograph discusses the laws governing search warrants and affidavits in support of search warrants. A search warrant is an order by the court to search a particularly described place and to seize particularly described property. An affidavit for a search warrant is a document that sets forth the grounds for issuing a warrant, as well as the factual averments from which a finding of probable cause may be made by the court.

The principal statutes specifying the requirements of search warrants and affidavits in support of search warrants are MCL 780.651-780.654. In addition, state and federal constitutional provisions govern search warrants. The United States and Michigan Constitutions protect against unreasonable searches and seizures by providing that no warrant shall issue without probable cause, supported by oath and affirmation. US Const, Am IV; Const 1963, art 1, § 11. The Michigan provision is worded similarly to the Fourth Amendment, and, absent compelling reasons, provides the same protection as the Fourth Amendment. *People v Levine*, 461 Mich 172, 178 (1999).

### 2.2 Initiating the Search Warrant Process

#### A. Drafting and Typing the Documents

\*The affidavit and search warrant do not have to be typed, although that is the preferred method of drafting such documents.

The affidavit and search warrant can be drafted by either: (1) the prosecuting official, which may include assistant attorneys general, assistant prosecuting attorneys, or attorneys for the city, village, or township; or (2) the applicable law enforcement agency. Preferably, the affidavit and warrant should be typed\* on SCAO Form DC 231, which contains helpful “instructions for preparing affidavit and search warrant” on its reverse side.

#### B. Signature of Prosecuting Official

\*Exceptions exist, however. See Smith, Criminal Procedure Monograph 1: *Issuance of Complaints & Arrest Warrants—Revised Edition* (MJJ, 2003), Section 1.8.

The signature of a prosecuting official is not legally necessary to issue a search warrant based upon an affidavit. MCL 600.8511(f) and *People v Brooks*, 75 Mich App 448, 450 (1977). This is unlike the issuance of an arrest warrant, which requires the signature of a prosecuting official. See MCL 764.1(2) (“A magistrate shall not issue a warrant for a minor offense unless an authorization in writing . . . is filed with the magistrate and signed by the prosecuting attorney . . . .”) and MCL 600.8511(d) (a magistrate has the authority “[t]o issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney . . . .”)\*

Although a prosecuting official's signature is not legally necessary to issue a search warrant, the "Affidavit for Search Warrant" in SCAO Form DC 231 contains a rectangular box in the lower left corner for the signature of a reviewing prosecuting official.

### C. Neutral and Detached Magistrate

A magistrate who issues a search warrant must be "neutral and detached," a requirement rooted in both the United States and Michigan Constitutions. *Shadwick v City of Tampa*, 407 US 345, 350 (1972); *People v Payne*, 424 Mich 475, 482-483 (1986); Const 1963, art 3, § 2.

In *Payne*, *supra*, the Michigan Supreme Court held that a magistrate who was also a court officer and a sworn member of the sheriff's department could not issue search warrants: "The probable cause determination must be made by a person whose loyalty is to the judiciary alone, unfettered by professional commitment, and therefore loyalty, to the law enforcement arm of the executive branch." Similarly, in *People v Lowenstein*, 118 Mich App 475, 486 (1982), the Court of Appeals held that a magistrate who previously had prosecuted and had been sued by the defendant was not neutral and detached. However, in *People v Tejeda (On Remand)*, 192 Mich App 635, 638 (1992), the Court of Appeals held that the "neutral and detached magistrate" requirement is not violated by a procedure where police officers wait in the magistrate's chambers for a phone call to provide them with additional information to complete the affidavit. The Court found that such a procedure, even though it places the police officers in the presence of the magistrate during the search warrant process, does not necessarily mean the magistrate has injected himself into the investigatory process.

In *Lowenstein*, *supra* at 483-484, the Court of Appeals provided the following circumstances in which a magistrate must disqualify himself or herself from authorizing warrants:

“[A magistrate] associated in any way with the prosecution of alleged offenders, because of his allegiance to law enforcement, cannot be allowed to be placed in a position requiring the impartial judgment necessary to shield the citizen from unwarranted intrusions into his privacy.’ . . . In other words, an otherwise duly appointed magistrate who just happens to be connected with law enforcement may not constitutionally issue warrants. . . . Next, the magistrate (or judge) must disqualify himself if he had a pecuniary interest in the outcome. A judge must also disqualify himself when one of the parties happens to be his client. . . . He must also disqualify himself where a party happens to be a relative. . . . Furthermore, he must disqualify himself in a subsequent contempt trial where he was the victim of the contempt. In fact, he must disqualify himself even if he was not the victim if he happened to have become embroiled in a running controversy in the

trial. In fact, Michigan requires a new judge any time that the trial judge defers consideration of a charge of contempt for misconduct during a trial until after a trial's conclusion." [Citations omitted.]

## **D. Authority to Issue Search Warrants**

### **1. District Court Magistrates**

MCL 600.8511(f) provides:

“A district court magistrate shall have the following jurisdiction and duties:

\* \* \*

“(f) To issue search warrants, when authorized to do so by a district court judge.”

A district court judge may grant “blanket authorization” to magistrates to issue search warrants; the authorization need not be on a case-by-case basis. See *People v Paul*, 444 Mich 940 (1994), where the Supreme Court, in lieu of granting appeal, reversed the judgments of the Court of Appeals and circuit court and thus granted “blanket authorization” authority to district court judges.

There is no requirement under MCL 600.8511 that the authorization to issue search warrants be in writing. *People v White*, 167 Mich App 461, 464-466 (1988) (“had the Legislature or Supreme Court intended to require written authorization, they would have done so”).

### **2. District or Circuit Court Judges**

There is general authority for circuit court judges to issue search warrants. MCL 780.651(2)(a) and (3) specify that judges may issue search warrants. MCL 780.651 also authorizes “magistrates” to issue search warrants. MCL 761.1(f) defines magistrate as a district court or municipal court judge, and goes on to state the following:

“This definition does not limit the power of a justice of the supreme court, *a circuit judge*, or a judge of a court of record having jurisdiction of criminal cases under this act, *or deprive him or her of the power to exercise the authority of a magistrate.*” [Emphasis added.]

In the event a district court judge knows that he or she may be temporarily unavailable to issue a search warrant, the chief judge of that district can request the chief judge of an adjoining district to direct a district judge within that adjoining district to serve

temporarily as a district judge and to review the search warrant. MCL 600.8212 provides:

“The chief judge of any district upon the request of the chief judge of an adjoining district may direct a district judge within the district to serve temporarily as a district judge in the adjoining district from which the request was made.”

See also *People v Fiorillo*, 195 Mich App 701, 704 (1992) (a district court may issue a warrant for a search outside its jurisdictional boundaries).

## E. Review of Decision to Issue Search Warrant

In reviewing the issuance of a search warrant, the reviewing court must determine whether a reasonably cautious person could have concluded that there was a “substantial basis” for finding probable cause. In *People v Russo*, 439 Mich 584 (1992), the Michigan Supreme Court held that reviewing courts should pay great deference to a magistrate’s decision but should “ensure that there is a substantial basis for the magistrate’s conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Id.* at 604, quoting *Illinois v Gates*, 462 US 213, 238 (1983). See also *People v Kazmierczak*, 461 Mich 411, 418 (2000) (“Probable cause to issue a search warrant exists where there is a “substantial basis” for inferring a “fair probability” that contraband or evidence of a crime will be found in a particular place”) and *United States v Ventresca*, 380 US 102, 108 (1965), where the United States Supreme Court stated:

“[A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.”

**Note:** The foregoing review principles were reaffirmed by the Michigan Supreme Court, in *People v Whitfield*, 461 Mich 441 (2000).

In a joint federal and state investigation in which a federal search warrant is issued, Michigan trial courts should apply any federal law governing search warrants, not Michigan law. See *People v Sobczak-Obetts*, 463 Mich 687, 700 (2001), where the Michigan Supreme Court disagreed with the dicta in *People v Pipok (After Remand)*, 191 Mich App 669 (1991) and

*People v Paladino*, 204 Mich App 505 (1994), which both concluded that Michigan law should govern federal search warrants litigated in Michigan courts:

“[W]e take this opportunity to note our disapproval of the dicta in *Pipok* and *Paladino* suggesting that state warrant requirements apply to joint federal and state execution of federal warrants. Michigan statutory provisions governing issuance and execution of search warrants, on their face, and as a matter of the legislative power of this state, address only search warrants . . . issued by judicial officers of Michigan.” *Sobczak-Obetts*, *supra*.

In *Sobczak-Obetts*, a federal magistrate issued a search warrant to federal and state authorities to search the defendant’s home. At the time of searching defendant’s home, the agents did not provide a copy of the affidavit to the search warrant to the defendant, a procedural violation of Michigan statutory law (but not federal law). The circuit court suppressed the admission of firearms seized pursuant to the search warrant based upon this procedural violation. The Court of Appeals affirmed. The Supreme Court reversed, holding that it could not conclude that the Legislature intended the exclusionary rule to apply to a procedural violation of Michigan’s statutory warrant requirements. This holding obviated the need to specifically decide the issue of the “joint activity” rule, although the Court, as noted above, expressed its disapproval with the “joint activity” dicta in *Pipok* and *Paladino*.

## 2.3 Description of the Place to be Searched

### A. Specific Description of Premises to be Searched

The United States and Michigan Constitutions require that a search warrant particularly describe the place to be searched. See US Const, amend IV (“no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched . . .”) and Const 1963, art I, § 11 (“No warrant to search any place or to seize any person or things shall issue without describing them . . .”). This “specificity” requirement is also embodied in MCL 780.654, which states in part:

“Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized.”

For multi-unit dwellings, i.e., apartment buildings, hotels, and rooming houses, the warrant “must specify the particular sub-unit to be searched, unless the multi-unit character of the dwelling is not apparent and the police officers did not know and did not have reason to know of its multi-unit character.” *People v Toodle*, 155 Mich App 539, 545 (1986); *People v Franks*, 54 Mich App 729, 732-733 (1974).

The place to be searched must be described with sufficient precision so as to exclude any and all other places. Thus, ambiguous phrases must be carefully avoided, especially when describing a specific unit in a multi-unit dwelling.\* If a street address or unit number is unavailable, the unit should be described using precise geographical references, as follows:

Example of a precise geographical description:

“All rooms accessible from the eastern most exterior door on the north side of the building”

Example of an imprecise geographical description:

“All rooms accessible from the eastern left-hand door of the building.”

Although specific addresses should be used when available, an inaccurate address will not always invalidate a search warrant. See *People v Westra*, 445 Mich 284, 285-286 (1994) (warrant not invalidated even though the apartment street address and unit number were incorrect since the police made a reasonable inquiry into the premises and address before executing their search).

## B. Scope of Premises Search and Seizure

The scope of a premises search warrant may include the search of all containers that may conceal the object of the search authorized in the warrant. See *People Coleman*, 436 Mich 124, 130-134 (1990) (defendant’s purse in bedroom of defendant’s home was properly searched as a container that fell within the scope of the warrant, and was not an extension of defendant’s person). This rule applies to locked and unlocked containers. *People v Daughenbaugh*, 193 Mich App 506, 516 (1992), modified on other grounds 441 Mich 867 (1992).

## 2.4 Description of the Person to be Searched

Although search warrants give authority to search the described premises and any specifically identified persons on the premises, it is sometimes unclear whether the warrant authorizes a search of persons who are present on the premises but who were not specifically identified in the search warrant.

MCL 780.654 requires particularized probable cause for the *place* and *property* to be searched, but it does not expressly provide legal requirements for a *person* to be searched. However, the United States Supreme Court has held that when a search warrant describes persons to be searched, it “must be supported by probable cause particularized with respect to that person.” *Ybarra v Illinois*, 444 US 85, 91 (1979) (warrant to search public bar and bartender did not extend to a *Terry*\* pat-down search of bar patrons present on the premises since the patrons were not described or named in the warrant

\*Judges should be mindful of boilerplate language in search warrants that may include broad areas to be searched.

\**Terry v Ohio*, 392 US 1 (1968).

as persons known to purchase drugs at that location, and since there was no reasonable belief that patrons were armed or dangerous). Compare, however, *People v Jackson*, 188 Mich App 117, 121 (1990), where the Court of Appeals distinguished *Ybarra* and upheld a *Terry* pat-down search of defendant who arrived at the alleged drug-house during the execution of the search warrant (“[*Ybarra*] involved an unjustified cursory search of patrons in a public bar, whereas this case deals with the search of an individual at a residence targeted for drug sales, which was conducted in light of various threats made against the searching officers”).

“The places and persons authorized to be searched by a search warrant must be described sufficiently to identify them with reasonable certainty so that the object of the search is not left in the officer’s discretion.” *People v Kaslowski*, 239 Mich App 320, 323 (2000).

In general, a search warrant authorizing a search of the premises and named or described persons does not authorize the search of those persons not named or described in the warrant. *People v Burbank*, 137 Mich App 266, 270-271 (1984). However, in *People v Arterberry*, 431 Mich 381, 383 (1988), the Michigan Supreme Court held that when a search of private premises pursuant to a warrant reveals controlled substances, police have probable cause to arrest and search incident to arrest occupants of the premises who were not named in the warrant. The occupants may be arrested for loitering in place of illegal occupation or business. The holding in *Arterberry* is consistent with *Michigan v Summers*, 452 US 692, 705 (1981), which held that a warrant to search a residence for contraband implicitly carries with it the limited authority to detain, but not search, occupants of the premises while a proper search of the home is conducted. Once evidence to establish probable cause to arrest an occupant is found, that person’s arrest and search incident thereto is constitutionally permissible.

An “occupant” has been construed to include a nonresident who is present at the scene of a search when police arrive, *United States v Fountain*, 2 F3d 656, 663 (CA 6, 1993), overruled on other grounds 194 F3d 708, 717 (CA 6, 1999), and an individual who may approach a property being searched pursuant to a warrant, pause at the property line, and then flee when officers tell him or her to stop. *Burchett v Kiefer*, 310 F3d 937, 933-934 (CA 6, 2002).

A person on the premises at the time of the execution of the warrant may be searched without a warrant if probable cause exists independently of the search warrant to search that particular person. *People v Cook*, 153 Mich App 89, 91-92 (1986). A search may also be made of a person, even though the search warrant does not specifically authorize the search of a person, if the affidavit in support of the search warrant establishes probable cause to support the search. *People v Jones*, 162 Mich App 675, 677-678 (1987).

To summarize, the following legal requirements apply to search warrants describing a person to be searched:



- : The search warrant must be supported with probable cause particularized to that person. *Ybarra v Illinois*, 444 US 85, 91 (1979).
- : A search warrant for contraband implicitly authorizes the police to detain all occupants of the premises while the search is conducted. *Summers, supra*.
- : A search warrant for a “public” premises does not authorize a search, even a pat-down search, of all persons present during the execution of the search warrant, unless the police officer has probable cause independent of the search warrant or affidavit or a reasonable belief that the persons are armed or dangerous. *Ybarra, supra*.
- : A search warrant for a “private” premises where controlled substances are discovered permits the police to arrest the occupants for loitering in a place of illegal occupation and to search them incident to their arrest. *Summers, supra*; *Arterberry, supra*.
- : A search warrant for a “private” premises allegedly involving drug sales permits the police to conduct a pat-down search of all persons arriving at the premises while the search is being conducted. *Jackson, supra*.

## 2.5 Description of Property to be Seized

General searches are prohibited under the Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11, which requires warrants to “particularly describ[e] the place to be searched, and the persons or things to be seized. . . .” See also MCL 780.654 (“[e]ach warrant shall designate and describe the . . . property or thing to be seized”), and *People v Collins*, 438 Mich 8, 37-38 (1991) (“the warrant must set forth, with particularity, the items to be seized.”)

The purpose of the particularization requirement under the United States and Michigan Constitutions and MCL 780.654 is to provide reasonable guidance to the police officers and to prevent the exercise of undirected discretion in determining what is subject to seizure. *People v Fetterley*, 229 Mich App 511, 543 (1998); *People v Taylor*, 93 Mich App 292, 298-299 (1979).

The degree of specificity required depends upon the circumstances and types of items involved. *People v Zuccarrini*, 172 Mich App 11, 15 (1988). In *Zuccarrini*, the Court of Appeals found that descriptions in a warrant of “all money and property acquired through the trafficking of narcotics,” and “ledgers, records or paperwork showing trafficking in narcotics,” were sufficiently particular since the executing officers’ discretion in determining what was subject to seizure was limited to items relating to drug trafficking. *Id.* at 16.

\*See Section 2.14(D) for more information on the “plain view” doctrine.

Evidence observed in plain view during the execution of a search warrant may be seized under the “plain view” doctrine,\* even though not specifically described or named in the warrant. The plain view doctrine allows a police officer to make a warrantless seizure of an item in plain view if the officer is lawfully in a position to view the item, and if the incriminating character of the item is “immediately apparent.” *People v Champion*, 452 Mich 92, 101 (1996); *Horton v California*, 496 US 128, 137 (1990). See also *United States v McLevain*, 310 F3d 434, 438-439 (CA 6, 2002) (plain view doctrine under *Horton* requires (1) that the officers be legally present; (2) that the officers see something that immediately appears to be evidence; (3) that the item is in plain view; and (4) that the officers have a lawful right of access to the object itself). The “immediately apparent” requirement does not mean that a police officer must “know” that certain items are contraband or evidence of a crime; rather, the police officer need only have probable cause to believe that the property is associated with criminal activity. *Texas v Brown*, 460 US 730, 742-744 (1983). Inadvertence of discovery is not a requirement of the plain-view exception under the Michigan Constitution. *People v Cooke*, 194 Mich App 534, 538 (1992).

The invalidity of a portion of a search warrant does not require suppression of all seized evidence. Instead, trial courts are to sever any tainted portions of the warrant—e.g., those portions that lack probable cause or do not sufficiently describe the place, property, or person—from the valid portions. The Court of Appeals, in *People v Kolniak*, 175 Mich App 16, 22-23 (1989), explained severance as follows:

“Severance does not ratify the invalid portions of the warrant, but recognizes that we need not completely invalidate a warrant on the basis of issues that are not related to the evidence validly seized. Where items are validly seized, a defect in a severable portion of the warrant should not be used to suppress the validly seized evidence.”

See also *People v Melotik*, 221 Mich App 190, 202-203 (1997), where the Court of Appeals remanded the case to the district court to “consider whether the facts contained in the second affidavit, after redaction of the facts arising solely from defendant’s inadmissible statement, established probable cause to issue the second warrant.”

## 2.6 Property Subject to Seizure

In addition to the constitutional “particularity” requirement, Michigan statutory law limits the types of items for which a search warrant may be issued. Under MCL 780.652, a warrant may be issued to search for and seize any property or thing that is:

“(a) Stolen or embezzled in violation of any law of this state.

“(b) Designed and intended for use or which is or has been used as the means of committing a criminal offense.

“(c) Possessed, controlled or used wholly or partially in violation of any law of this state.

“(d) Evidence of crime or criminal conduct on the part of any person.

“(e) Contraband.

“(f) The bodies or persons of human beings or of animals, who may be the victims of a criminal offense.

“(g) The object of a search warrant under any other law of this state providing for the same. If a conflict exists between this act and any other search warrant law, this act shall be deemed controlling.”

Additionally, other Michigan statutes authorize the issuance of search warrants for any of the following property or things:

- : Alcoholic liquors and containers, MCL 436.1235.
- : Blood alcohol content in drunken driving cases, MCL 257.625a.
- : Body cavity searches, MCL 764.25b.
- : Chop shop materials, MCL 750.535a.
- : Controlled substances, MCL 333.7502.
- : Gaming implements, MCL 750.308.
- : Hair, blood, or other bodily fluids obtained in criminal sexual conduct crimes (related by blood or affinity), MCL 780.652a.
- : Ionizing radiation, MCL 333.13517.
- : Large carnivores, MCL 287.1117.
- : Pistols, weapons, and devices unlawfully possessed, MCL 750.238 (penal code); MCL 28.433 (firearms code).
- : Tortured animals and instruments of torture, MCL 750.54.
- : Wild birds, animals, and fish, MCL 324.1602.
- : Wolf-dogs, MCL 287.1017.

## 2.7 Search Warrant Requirements for Monitoring and Recording Private Conversations

### A. Third-Party Monitoring (Wiretaps)

The United States Supreme Court has held that third-party monitoring, e.g., the wiretapping of private conversations, is subject to the Fourth Amendment warrant requirements if done without the consent of either party. *Katz v United States*, 389 US 347, 358-359 (1967).

### B. Participant Monitoring by Law Enforcement

A search warrant is not required when a law enforcement officer electronically monitors or records a conversation between an informant and another person as long as one of the participants to the conversation consents to the conversation. *People v Collins*, 438 Mich 8, 40 (1991).

### C. Participant Monitoring by Private Citizens

Michigan's eavesdropping statute makes it a felony to eavesdrop on a "private conversation" without the consent of all parties to the conversation. MCL 750.539c provides:

"Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs, or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00, or both."

In *People v Stone*, 463 Mich 558 (2001), the Michigan Supreme Court held that the eavesdropping statute does not preclude a cordless telephone conversation from being deemed a "private conversation," even though available technology, such as a police scanner, may provide a means for private citizens to eavesdrop on those conversations. According to the Court, a "private conversation" means "a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance." *Id.* at 563. See also *Dickerson v Raphael*, 461 Mich 851 (1999) (a "private conversation" depends on whether the person conversing "intended and reasonably expected that the conversation was private, not whether the subject matter was intended to be private," and a participant may "not unilaterally nullify other participants' expectations of privacy by secretly broadcasting the conversation").

Recordings made without a search warrant and in violation of Michigan's eavesdropping statute are admissible in criminal cases. In *People v Livingston*, 64 Mich App 247 (1975), the Court of Appeals concluded that a search warrant was not required where the tape recordings were done by

an individual in his capacity as a private citizen, not as an agent of the police. Noting that the Legislature did not put an exclusionary rule in the statute, the Court stated that “we will not judicially create a remedy that the Legislature chose not to create.” *Id.* at 255.

## 2.8 Probable Cause Determination

An affidavit in support of a search warrant must set forth the grounds and establish probable cause to support the issuance of a warrant. See *Spinelli v United States*, 393 US 410, 413 n 3 (1969) and MCL 780.653 (“[t]he magistrate’s finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her”). See also *People v Kaslowski*, 239 Mich App 320, 323 (2000) (a search warrant may not be issued unless probable cause exists to justify the search). Oral testimony not reduced to writing may not be used to supplement the information contained in the affidavit. *People v Sloan*, 450 Mich 160, 177-178 (1995), overruled on other grounds 460 Mich 118, 123-124 (1999).

All search warrants, including the underlying affidavits, are to be read in a common-sense and realistic manner. *Illinois v Gates*, 462 US 213, 230-232 (1983).

### A. Probable Cause Defined

Probable cause to justify the issuance of a search warrant exists when the facts and circumstances would lead a reasonable person to conclude that the evidence of a crime or contraband sought is in the place stated in the warrant. *People v Ulman*, 244 Mich App 500, 509 (2001). See also *People v Kazmierczak*, 461 Mich 411, 418 (2000) (probable cause exists when the facts and circumstances allow a reasonably prudent person to believe that evidence of a crime or contraband is in the stated place). Probable cause must exist at the time the warrant is issued. *People v Humphrey*, 150 Mich App 806, 813 (1986).

“The magistrate’s finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her.” MCL 780.653. To support a finding of probable cause, the affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs. *People v Sloan*, 450 Mich 160, 168-169 (1995), overruled on other grounds 460 Mich 118 (1999). A magistrate is allowed to rely on the affiant’s training and experience in assessing probable cause. *People v Darwich*, 226 Mich App 635, 638-639 (1997). Police officers are presumptively reliable, and self-authenticating details establish reliability. *People v Powell*, 201 Mich App 516, 523 (1993).

The United States Supreme Court has stated that “articulating precisely what . . . ‘probable cause’ means is not possible. [It is a] commonsense, nontechnical conception[] that deals with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not

legal technicians, act' [and] as such the standards are 'not readily, or even usefully, reduced to a neat set of legal rules.' . . . We have cautioned that [this] legal principle[] [is] not [a] 'finely-tuned standard []' comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. [It is] instead [a] fluid concept[] that takes [its] substantive content from the particular contexts in which the standards are being assessed." *Matthews v Blue Cross & Blue Shield*, 456 Mich 365, 387 n 34 (1998), quoting *Ornelas v United States*, 517 US 690 (1996).

Regarding the degree of probability required for "probable cause," the Michigan Supreme Court has held that to issue a search warrant a magistrate need not require that the items be "more likely than not" in the place to be searched; rather, a magistrate need only reasonably conclude that there is a "fair probability" that the evidence be in the place indicated in the search warrant. *People v Russo*, 439 Mich 584, 614-615 (1992).

An application to seize items protected under the First Amendment need not be evaluated under a higher standard of probable cause than other areas of Fourth Amendment law. *New York v P.J. Video, Inc.*, 475 US 868, 874 (1986). See also *White Fabricating Co v United States*, 903 F2d 404, 411 (CA 6, 1990) (there is no "higher" standard for probable cause for issuance of a warrant required in First Amendment cases).

Search warrant affidavits are presumed to be valid. *People v Poindexter*, 90 Mich App 599, 604 (1979), quoting *Franks v Delaware*, 438 US 154, 171-172 (1978). However, a defendant may challenge the veracity of an allegation contained in a search warrant affidavit and request a court to order an evidentiary hearing to determine the veracity of the allegations contained in a search warrant affidavit. *Poindexter*, *supra* at 604-610. To mandate such a hearing, the defendant must: (1) allege deliberate falsehood or reckless disregard for the truth, and (2) support the allegation with an offer of proof that is more than conclusory, and that is supported by more than a mere desire to cross-examine. *Id.* at 604, quoting *Franks*, *supra* at 171-172. To obtain suppression of evidence based on alleged false information in an affidavit, the defendant must show, by a preponderance of the evidence, that (1) the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit; and (2) that false information was necessary to a finding of probable cause. *People v Williams*, 240 Mich App 316, 319-320 (2000).

"Where the defendant challenges the truth of facts alleged in the affidavit, our courts have struck only the challenged portions of the warrant or its affidavit. In those cases, if enough substance remains to support a finding of probable cause the warrant is valid." *People v Kolniak*, 175 Mich App 16, 22 (1989).

## B. Staleness

A search warrant must be supported on probable cause existing *at the time* the warrant is issued. *People v Gillam*, 93 Mich App 548, 552 (1979).

Thus, stale information is insufficient as a basis for an affidavit. *People v Chippewa Circuit Judge*, 226 Mich 326, 328-329 (1924). However, the mere lapse of time between the occurrence of the underlying facts and issuance of the search warrant does not automatically render the warrant stale. The measure of a search warrant's staleness does not rest on whether there is recent information to confirm that a crime is being committed, but rather on whether there is probable cause which is sufficiently fresh to presume the items to be seized remain on the premises. *People v Osborn*, 122 Mich App 63 (1982). Probable cause is more likely to be "sufficiently fresh" when a history of criminal activity is involved. *People v Gillam*, 93 Mich App 548, 553 (1979).

Staleness "is not a separate doctrine in probable cause to search analysis"; instead "[i]t is merely a part of the Fourth Amendment inquiry." *People v Russo*, 439 Mich 584, 605 (1992). Although important in probable cause determinations, time must be "weighed and balanced in light of other variables in the equation, such as whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense." *Id.* at 605-606.

There is no bright-line rule regarding how much time may intervene between obtaining the facts and presenting the affidavit; however, the time should not be too remote. *People v Mushlock*, 226 Mich 600, 602 (1924). "[T]he test of remoteness is a flexible and reasonable one depending on the facts and circumstances of the particular case in question." *People v Smyers*, 47 Mich App 61, 73 (1973).

In *People v Wright*, 367 Mich 611, 614 (1962), the Supreme Court held that an affidavit based on information existing six days before the issuance of the warrant was too stale to support the warrant. See also *People v Broilo*, 58 Mich App 547, 550-552 (1975) (affidavit based on drug sales to a confidential informant made eight and ten days before issuance and execution of warrant deemed too stale to support warrant). However, see *Smyers*, *supra* at 72-73 (a six-day delay between issuance of warrant and affiant's visit to defendant's home and observation of stolen cocktail dress deemed not too remote). See also *People v Berry*, 84 Mich App 604 (1970) and *People v White*, 167 Mich App 461 (1988), where the Court of Appeals found that information several months old (and other information nearly one year old) was deemed sufficiently fresh in cases where the facts revealed a continuing criminal enterprise.

In *People v David*, 119 Mich App 289, 296 (1982), the Court of Appeals held that although a three-day delay between the time of a single controlled drug buy and the presentation of the affidavit to the magistrate does not automatically render the affidavit stale, it did in this case because there was no evidence to suggest that defendant would still possess the marijuana three days after the sale. In *People v Russo*, 185 Mich App 422, 435 (1990), the Court of Appeals found that an affidavit based on information seven years old, which contained no allegations of ongoing criminal activity, and which gave no reasons why the passage of time was irrelevant, was not sufficiently fresh to presume that the items sought still

remained on the premises. See also *People v Siemieniec*, 368 Mich 405, 407 (1962) (information that defendant illegally sold liquor four days earlier, without evidence of continuing illegal activity, is too stale to support a probable cause finding).

### C. Anticipatory Probable Cause

The Michigan Court of Appeals has upheld the use of “anticipatory” search warrants, i.e., “warrant[s] based upon . . . affidavit[s] showing probable cause that at some future time (but not presently) certain evidence will be located at a specified place,” finding them not in contravention of constitutional provisions. *People v Kaslowski*, 239 Mich App 320, 324 (2000).

In *Kaslowski*, a police officer working with the Drug Enforcement Administration spotted a suspicious looking package at a United Parcel Service branch office. A dog trained to identify narcotics reacted positively to the package. The police, after obtaining a search warrant, opened the package and found approximately 28 pounds of marijuana. After obtaining another warrant to install an electronic monitoring device programmed to emit a signal when the package was opened, and to enter and search the house where the package was delivered (and addressed), an undercover police officer posing as a UPS person delivered the package to the listed address. Four to five minutes after the package was taken inside the house, the signal activated, and the police executed the search warrant, finding defendant, another person, the opened package, scales, currency, and an additional three-and-a-half pounds of marijuana. After pleading guilty to possession with intent to deliver marijuana, defendant appealed on the grounds that the trial court erred in reversing the district court’s determination that the anticipatory search warrant was issued without probable cause and without limiting language. The Court of Appeals disagreed, finding that the anticipatory search warrant and affidavit were of one construct, titled “Search Warrant and Affidavit,” and that the affidavit “adequately established the narrow circumstances upon which the police were authorized to execute the warrant.” *Id.* at 328. Furthermore, because the affidavit and search warrant were of one construct, the Court felt it unnecessary to decide the issue of whether an anticipatory search warrant on its face must contain the limiting language or whether the supporting affidavit may contain such language. *Id.* at 327-329.

### D. Conclusory Statements

Probable cause determinations must be made from the facts and circumstances contained within the affidavit, and not from any conclusory statements. In *People v Sloan*, 450 Mich 160, 168-169 (1995), overruled on other grounds 460 Mich 118 (1999), the Michigan Supreme Court stated the following regarding a magistrate’s review of search warrant affidavits:



“[T]he magistrate’s decision [must be] based on actual facts--not merely the conclusions of the affiant. One of the main purposes of the warrant application procedure is to have a neutral and detached magistrate determine whether probable cause exists. This purpose cannot be achieved if the magistrate simply adopts unsupported conclusions of the affiant. Accordingly, at a minimum, a sufficient affidavit must present facts and circumstances on which a magistrate can rely to make an independent probable cause determination.”

See also *People v Rosborough*, 387 Mich 183 (1972), where the Supreme Court made the following comments regarding affidavits:

“The affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or belief. An affidavit made on information and belief is not sufficient. The affidavit should clearly set forth the facts and circumstances within the knowledge of the person making it, which constitute the grounds of the application. The facts should be stated by distinct averments, and must be such as in law would make out a cause of complaint. It is not for the affiant to draw his own inferences. He must state matters which justify the drawing of them.” *Id.* at 199, quoting 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 868, p 1129.

## 2.9 Affidavits Based upon Hearsay Information

An affidavit may be based upon hearsay information supplied to the affiant by a named or unnamed person, subject to two requirements. MCL 780.653, which was amended by 1988 PA 80, effective June 1, 1988, requires an affidavit to contain the following:

“(a) *If the person is named*, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.

“(b) *If the person is unnamed* [i.e., a confidential informant], affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information *and* either that the unnamed person is credible or that the information is reliable.” [Emphasis added.]

The significance of the 1988 amendment to MCL 780.653(a)-(b) is that it makes Michigan’s search warrant requirements, at least when the search warrant affidavit is based on hearsay from an unnamed (i.e., confidential) informant, consistent with the “Aguilar-Spinelli” two-prong test. This test, as

espoused in *Aguilar v Texas*, 378 US 108 (1963) and *Spinelli v United States*, 393 US 410 (1969), allows a choice between informant credibility and information reliability. However, the United States Supreme Court abandoned the “Aguilar-Spinelli” test in *Illinois v Gates*, 462 US 213 (1983), in favor of a “totality of the circumstances” test, a lower standard in assessing the sufficiency of an affidavit.

In Michigan, a split of authority exists on whether the “totality of the circumstances” analysis or the “Aguilar-Spinelli” test is required to test the sufficiency of search warrant affidavits. See *People v Brown*, 132 Mich App 128, 130-131 (1984) (applying more stringent “Aguilar-Spinelli” analysis under Michigan Constitution); *People v Cortez*, 131 Mich App 316, 328-330 (1984) (applying less stringent “totality of circumstances” test without distinguishing federal or state constitution); and *People v Gentry*, 138 Mich App 225, 227, 232 (1984) (applying “totality of circumstances” test under the assumption that federal constitutional question was raised).

Although a search warrant affidavit may not name the person who was the source of the information, Michigan courts may apply “a common-sense reading of the affidavit” to determine who was the actual source of the allegations underlying the search warrant affidavit, thus making an unnamed person a named one. See *People v Powell*, 201 Mich App 516, 522 (1993) (a “common-sense reading of the affidavit, taken as a whole, yields the conclusion that the affiant obtained her information directly from the named crime victim,” thus making the victim not an “unidentified informant”).

Michigan courts consider identified citizens, identified crime victims, and police officers to be presumptively reliable and thus not subject to the requirements once applied to confidential informers under the “Aguilar-Spinelli” test. *Id.* at 522-523.

**Note:** The Michigan Supreme Court has granted leave to appeal in a case involving the issue of whether a violation of MCL 780.653 should be remedied by exclusion of the evidence seized. See *People v Hawkins*, 466 Mich 860 (2002).

### **A. Informant Must Speak with Personal Knowledge**

This requirement means that an informant who supplied the factual information in the affidavit must have personally witnessed the facts which are attested to. It does not mean that an affidavit may not contain multiple hearsay. Multiple hearsay is acceptable as long as the ultimate source of the information spoke with personal knowledge. If the source is unnamed, the source must also be shown to be credible **or** that the information provided by the source is reliable. See MCL 780.653(b) and *People v Osborn*, 122 Mich App 63, 68-69 (1982).

## B. Informant Must Be Credible or Information Must Be Reliable

A search warrant affidavit must contain facts within the knowledge of the affiant, not merely the affiant's conclusions or beliefs. *People v Sloan*, 450 Mich 160, 168-169 (1995), overruled on other grounds 460 Mich 118 (1999); see also MCL 780.653 ("The magistrate's findings of . . . probable cause shall be based on all the facts related within the affidavit made before him or her"). Thus, a statement in the affidavit that the informant is a "credible person" does not satisfy this statutory requirement. *People v Sherbine*, 421 Mich 502, 511 n 16 (1984).

Regarding "informant credibility," the Supreme Court in *Sherbine*, *supra* at 510 n 3, gave three examples of factual information that is probative of "informant credibility":

- A course of past performance in which the informant has supplied reliable information;
- Admissions against the informant's penal interest; and
- Corroboration of non-innocuous details of the informant's story by reliable independent sources or police investigation.

The statutory alternative of "informational reliability" must also be established by factual averments in the affidavit. In most cases, once "informant credibility" is established, it logically follows that the information is reliable, and vice versa. However, a subtle distinction may be drawn in situations where the method of procuring the information is unknown. The United States Supreme Court, in *Spinelli v United States*, 393 US 410, 416 (1969), explained this circumstance as follows:

"In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Thus, by describing the criminal activity in detail, the reliability of the information can be proven independent of informant credibility.

## 2.10 Affidavits Based on Results of Preliminary Breath Test

\*MCL 257.625h(2) no longer governs the admission of PBT results. However, see MCL 257.625a(2)(b), which governs such results.

The results of a preliminary breath test (PBT) may be used to establish probable cause in a search warrant affidavit. In *People v Tracy*, 186 Mich App 171 (1990), the Court of Appeals interpreted MCL 257.625h(2),\* the statutory provision prohibiting the use of PBT results in criminal prosecutions, and held that a magistrate may consider PBT results when issuing a search warrant, even though a person's PBT results are generally prohibited from admission into evidence during any criminal trial. The Court concluded that a police officer's administration of the PBT, and thereafter going before a magistrate to obtain a search warrant, was investigatory activity and not within the definition of a criminal prosecution. Thus, because the search warrant preceded the appearance ticket, the Court found that the PBT results were used before the commencement of criminal prosecution, and the restrictions of MCL 257.625h(2) did not apply. *Tracy, supra* at 179.

## 2.11 Verifying and Executing the Affidavit

MCL 780.651(1) provides:

“When an affidavit is made on oath to a magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing a warrant pursuant to this act, the magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the property or thing to be searched for and seized is situated.”

Once the court is satisfied that the warrant is in proper form and that the affidavit establishes probable cause to believe the items to be seized may be found in the place to be searched, it must swear the affiant and ask him or her to state that the averments in the affidavit are true to the best of his or her information and belief.

After the affiant has signed the affidavit, the court should sign and date it. This indicates the affidavit was signed and subscribed in the presence of the court on that date. Following this, the court should sign and date the search warrant, thereby “issuing” the warrant. The court must retain the original affidavit and warrant for its own records. When using SCAO Form DC 231, the court's copy is noted in red ink at the bottom of the page.

The following subsections address the legal requirements for executing affidavits and search warrants.

## A. Affiant's Signature Requirement

The court should require the affiant to sign the affidavit since a search warrant based upon an unsigned affidavit is presumed to be invalid. However, this presumption of invalidity may be rebutted by the prosecutor in a supplemental hearing by showing that the affidavit was made on oath to the magistrate. *People v Mitchell*, 428 Mich 364, 368 (1987). See also *People v Tice*, 220 Mich App 47, 52-53 (1996) (remanded to the trial court for a determination of whether the facts in the search warrant affidavit were presented to the magistrate under some form of oath or affirmation).

## B. Magistrate's Signature Requirement

A search warrant that is unsigned by the magistrate is presumptively invalid. However, "this presumption may be rebutted with evidence that, in fact, the magistrate or judge did make a determination that the search was warranted and did intend to issue the warrant before the search." *People v Barkley*, 225 Mich 539, 544 (1997). In *Barkley*, the Court of Appeals, in concluding that the prosecutor amply rebutted the invalidity of the search warrant even though one of four copies of the search warrant remained unsigned by the magistrate, found that the *Mitchell*, *supra*, treatment of unsigned affidavits was equally appropriate for unsigned search warrants. In deciding to apply the same procedure for unsigned affidavits and warrants, the Court stated: "To hold otherwise and invalidate a warrant for lack of a signature when there is other evidence that the judge or magistrate intended that the warrant should issue would be "a classic case of exaltation of form over substance." *Barkley*, *supra* at 545.

**Note:** Although two previous Court of Appeals opinions have held that a magistrate's failure to sign a warrant invalidates the warrant and requires suppression of evidence, those opinions were issued before November 1, 1990 and are thus not binding precedent in light of the opinion in *Barkley*, *supra*, decided in 1997. MCR 7.215(I)(1). See *People v Locklear*, 177 Mich App 331 (1989) (invalidating warrant under Const 1963, art 1, § 11 because magistrate failed to sign the warrant until three days after execution of warrant) and *People v Hentkowski*, 154 Mich App 171 (1986) (invalidating warrant because judge signed affidavit and not the warrant).

## C. Information in Affidavit and Supplementation with Oral Statements

In determining whether there is probable cause to issue a search warrant, the magistrate must consider only the information contained in the affidavit. See MCL 780.653 ("The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit

made before him or her”). Additionally, the information in an affidavit may not be supplemented with oral statements given on oath to the magistrate when no contemporaneous record of these statements has been made. See *People v Sloan*, 450 Mich 160, 183 (1995) (“[R]eviewing courts may not consider sworn, yet unrecorded, oral testimony presented to a magistrate when assessing the magistrate’s probable cause determination”).

## 2.12 Executing the Search Warrant

Michigan’s so-called “knock-and-announce” statute is contained in MCL 780.656, and provides as follows:

“The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.”

The Michigan Court of Appeals has interpreted MCL 780.656 to require police officers who execute a search warrant to first give notice of their authority and purpose, and to be refused entry before forcing themselves into the house or building. *People v Fetterley*, 229 Mich App 511, 521 (1998). The executing officers must wait a reasonable period of time for the occupants to answer the door after announcing their presence and purpose. *People v Williams*, 198 Mich App 537, 545 (1998). Although it is known as the “knock-and-announce” rule, “[n]either case law nor statute requires that the police physically knock on the door; rather, they need only give proper notice to the occupants of their authority and purpose.” *Fetterley, supra* at 524.

The United States Supreme Court has held that the “knock-and-announce” requirements form a part of the reasonableness inquiry under the Fourth Amendment. *Wilson v Arkansas*, 514 US 927, 930 (1995). However, mere noncompliance with Michigan’s “knock-and-announce” statute does not automatically trigger the exclusionary rule to suppress seized evidence. See *People v Stevens*, 460 Mich 626, 645 (1999) (“The Legislature has not chosen to specifically mandate the sanction of excluding evidence seized as a result of the violation of MCL 780.656 [parallel citation omitted]. Nothing in the wording of the statute would suggest that it was the legislators’ intent that the exclusionary rule be applied to violations of the ‘knock and announce’ statute”). Instead, to warrant the sanction of suppression, there has to be a causal relationship between the statutory violation and the improper seizing of evidence under the Fourth Amendment. *Id.* at 639. See also *People v Polidori*, 190 Mich App 673, 677 (1991) (“[W]hen the method of entry violates the knock-and-announce statute, the exclusionary rule may come into play if the Fourth Amendment standard of reasonableness is also offended”). *Id.* at 677.

Once property is seized during the execution of the search warrant, the officer must make a complete and accurate tabulation of the seized property, in the presence of another person. MCL 780.655(1). Additionally, the officer must leave a copy of the warrant (but not the affidavit) and tabulation at the premises. MCL 780.655(1) provides:

“When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things that were seized. The officer taking property or other things under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. The officer is not required to give a copy of the affidavit to that person or to leave a copy of the affidavit at the place from which the property or thing was taken.”

A copy of the affidavit becomes part of the “copy of the warrant” that must be provided or left under MCL 780.655. *People v Garvin*, 235 Mich App 90, 99 (1999). However, a failure to comply with this statutory requirement does not require suppression of the seized evidence. *Id.* See also MCL 780.654(3), which allows a magistrate to order the suppression of the affidavit in circumstances necessitating the protection of an investigation or the privacy or safety of a victim or witness:\*

“Upon a showing that it is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness, the magistrate may order that the affidavit be suppressed and not be given to the person whose property was seized or whose premises were searched until that person is charged with a crime or named as a claimant in a civil forfeiture proceeding involving evidence seized as a result of the search.”

Additionally, the officer must promptly file the tabulation with the court or magistrate. MCL 780.655(2) provides:

“The officer shall file the tabulation promptly with the court or magistrate. The tabulation may be suppressed by order of the court until the final disposition of the case unless otherwise ordered. The property and things that were seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence in any trial.

\*This provision was added by 2002 PA 112, effective April 22, 2002.

After the execution of the warrant, seized property must be returned and disposed of according to MCL 780.655(3), which provides:

“As soon as practicable, stolen or embezzled property shall be restored to the owner of the property. Other things seized under the warrant shall be disposed of under direction of the court or magistrate, except that money and other useful property shall be turned over to the state, county or municipality, the officers of which seized the property under the warrant. Money turned over to the state, county, or municipality shall be credited to the general fund of the state, county, or municipality.”

A failure to strictly comply with the requirements of MCL 780.655 does not by itself require suppression of seized evidence. In *People v Sobczak-Obetts*, 463 Mich 687, 712-713 (2001), the Supreme Court held that the trial court and Court of Appeals erred by applying the exclusionary rule to conduct that amounted to a technical violation of MCL 780.655, i.e., an officer’s failure to provide a copy of the affidavit in support of the warrant to defendant at the time of the search, since there was no discernable Legislative intent that a violation of MCL 780.655 requires suppression, and since there was no police misconduct to necessitate application of the exclusionary rule, which is predicated upon deterring such conduct.

## 2.13 The Exclusionary Rule and Good Faith Exception

The exclusionary rule “forbids the use of direct and indirect evidence acquired from governmental misconduct, such as evidence from an illegal police search.” *People v Stevens*, 460 Mich 626, 636 (1999). It “operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule’s general deterrent effect.” *Arizona v Evans*, 514 US 1, 10 (1995).

The exclusionary rule was first applied in Michigan in *People v Margelis*, 217 Mich 423 (1922). The federal exclusionary rule was made applicable to the states via the Due Process Clause of the Fourteenth Amendment in *Mapp v Ohio*, 367 US 643 (1961). When determining whether evidence should be excluded, a court must “evaluate the circumstances of [the] case in the light of the policy served by the exclusionary rule . . .” *Brown v Illinois*, 422 US 590, 604 (1975). The purpose of the exclusionary rule is to deter the police from violations of constitutional and statutory protections. *Nix v Williams*, 467 US 431, 442-443 (1984). “The exclusionary rule is not meant to put the prosecution in a worse position than if the police officers’ improper conduct had not occurred, but, rather, it is to prevent the prosecutor from being in a better position because of that conduct.” *Stevens, supra* at 640-641, citing *Nix, supra* at 443.

The Michigan Constitution contains an anti-exclusionary provision prohibiting the exclusion from evidence of various items of property or



contraband seized by a peace officer *outside the curtilage of a dwelling house*. Const 1963, art 1, § 11 provides, in pertinent part:

“The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive, or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.”

The foregoing constitutional provision compels no higher standard of reasonableness for searches than the standard imposed by federal law. See *People v Carter*, 250 Mich App 510, 519-520 (2002) (“The language of the constitutional provision and its history ‘precludes a construction of the Michigan search and seizure clause imposing a higher standard of reasonableness for searches and seizures of items named in the proviso than the United States Supreme Court has held applicable under the Fourth Amendment,’” quoting *People v Moore*, 391 Mich 426, 435 (1974)). For a detailed history of this anti-exclusionary provision, and its predecessor, see *People v Nash*, 418 Mich 196, 208-215 (1983).

In *United States v Leon*, 469 US 981 (1984), the United States Supreme Court created a “good faith” exception to the exclusionary rule, which provides that a defect in the warrant will not lead to suppression of the evidence when there is no police misconduct. In creating this “good faith” exception, the Supreme Court stated that since the exclusionary rule is not contained within the Fourth Amendment, it may be modified by the judiciary. The Supreme Court found that evidence seized in reasonable reliance on a warrant issued by a detached and neutral magistrate should be admissible into evidence. It reasoned that marginal or non-existent benefits produced by suppressing evidence obtained in reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.

In *Illinois v Krull*, 480 US 340, 379 (1987), the United States Supreme Court held that a search made in good faith and reasonable reliance on a statute which authorized the search will not result in exclusion of the evidence, even if that statute is found to be unconstitutional.

Michigan does not recognize a good-faith exception to the exclusionary rule under the Michigan Constitution. See *People v Scherf*, 251 Mich App 410 (2002), lv gtd 467 Mich 856 (2002) (specifically declining to recognize and apply a “good faith” exception to the exclusionary rule under the binding precedent of *People v Hill*, 192 Mich App 54 (1991)).

## 2.14 Other Exceptions Applicable to Search Warrants

### A. Inevitable Discovery Doctrine

The inevitable discovery doctrine permits evidence discovered as a result of a constitutional violation to be admissible into evidence if the prosecution can establish, by a preponderance of the evidence, that the evidence ultimately or inevitably would have been discovered by lawful means. *Nix v Williams*, 467 US 431, 443-444 (1984).

The Michigan Supreme Court and Court of Appeals have also recognized and adopted the inevitable discovery doctrine. See *People v Stevens*, 460 Mich 626, 643 (1999) (inevitable discovery doctrine applies to “knock-and-announce” reasonableness provisions of Fourth Amendment). See also *People v Brezinzski*, 243 Mich App 431, 436 (2000) (“[t]he inevitable discovery doctrine is recognized in Michigan and may justify the admission of otherwise tainted evidence that ultimately would have been obtained in a constitutionally accepted manner”).

The Michigan Supreme Court set forth three factors to be used when applying the inevitable discovery doctrine:

“There are three basic concerns which surface in an inevitable discovery analysis: are the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection?” *Stevens, supra* at 638, quoting *United States v Silvestri*, 787 F2d 736, 744 (CA 1, 1986).

### B. Independent Source Doctrine

The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of illegal activity or any constitutional violation. *Segura v United States*, 468 US 796, 805, 813-816 (1984); *Nix v Williams*, 467 US 431, 443 (1984).

The Michigan Supreme Court and Court of Appeals has recognized and adopted the independent source doctrine. *People v Stevens*, 460 Mich 626, 636-637 (1999); *People v Harajli*, 148 Mich App 189, 195 (1986); *People v Oswald*, 188 Mich App 1, 6-7 (1991); *People v Kroll*, 179 Mich App 423, 428 (1989).

In *People v Smith*, 191 Mich App 644, 646 (1991), the Court of Appeals held that an unlawful entry by police upon private premises does not require suppression of evidence subsequently discovered on those premises pursuant to a search warrant obtained on the basis of information wholly unconnected with the unlawful entry. See also *People v Snider*,

239 Mich App 393, 412 (2000), where the Court of Appeals, relying on *Smith, supra*, upheld the second search of a residence conducted pursuant to a properly issued and executed search warrant, since the warrant provided an independent basis for the second entry and an “independent source” for discovery and seizure of the evidence.

### C. Reasonable Mistake Doctrine

The reasonable mistake doctrine provides that when a “reasonable mistake” in the execution of an overly broad search warrant is made, the seized evidence need not necessarily be suppressed from evidence. In *Maryland v Garrison*, 480 US 79, 80 (1987), the police conducted a search, pursuant to a warrant, of an apartment (McWebb’s) on the third floor of 2036 Park Avenue. The officers eventually became aware that the third floor was actually divided into two apartments, one for McWebb and one for defendant Garrison. Before coming to this realization, and while in defendant Garrison’s apartment, the officers discovered contraband which provided a basis for defendant’s controlled substance conviction. The Supreme Court examined both the validity of the warrant and the reasonableness of its execution. Regarding the validity of the warrant, the Supreme Court stated that the warrant was broader than appropriate, and that the evidence that emerged after issuance of the warrant had no bearing on whether the warrant was valid in the first place. The Court concluded that based on the information that the officers were operating under—albeit mistaken—the warrant was valid when issued. Regarding the reasonableness of the warrant’s execution, the Court stated that since the objective facts available to the officers suggested no distinction between McWebb’s apartment and the third floor apartment, the officers’ conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment.

### D. Plain View Doctrine

The plain view doctrine permits a police officer to seize, without a warrant, items in plain view if the items have an “immediately apparent” incriminating character, and if the officer is in a lawful position when viewing the items. *People v Champion*, 452 Mich 92, 101 (1996), citing *Horton v California*, 496 US 128, 137 (1990). “Immediately apparent” means that the officers have, without further searching, probable cause to believe the items are subject to seizure. *Champion, supra* at 102, citing *Texas v Brown*, 460 US 730, 741-742 (1983).

One fundamental characteristic of the plain view doctrine is that it is exclusively a seizure rationale. In other words, no additional searching may be done under this doctrine. *Champion, supra* at 101, citing *Arizona v Hicks*, 480 US 321 (1987).

In applying the plain-view doctrine, the Michigan Court of Appeals has held that a failure to locate and seize the plain-view contraband used to support the probable cause to make a warrantless search of an automobile renders any further search unreasonable. See *People v Martinez*, 192 Mich

App 57, 64 (1991) (police officer's observance in plain view, through a frosty car window, of what he thought to be a hand-rolled marijuana cigarette did not establish probable cause to further search the automobile after the alleged cigarette could not be located).

## E. Exigent Circumstances Doctrine

The exigent circumstances doctrine permits a warrantless entry by law enforcement officials where “there is [a] compelling need for official action and no time to secure a warrant.” *Michigan v Tyler*, 436 US 499, 509 (1978). Even though “the precise contours of the exigent circumstances exception remain hazy,” Michigan appellate courts have held that “the risk of destruction or removal of evidence may constitute an exigent circumstance exception to the warrant requirement.” *People v Blasius*, 435 Mich 573, 583 (1990). See *People v Snider*, 239 Mich App 393, 407 (2000) and cases cited therein.

The Michigan Supreme Court explained the requirements of the exigent circumstances exception as follows:

“[W]e hold that the police may enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. If the police discover evidence of a crime following the entry without a warrant, that evidence may be admissible.” *In re Forfeiture of \$176,598*, 443 Mich 261, 271 (1993).

“[T]he validity of an entry for a protective search without a warrant depends on the reasonableness of the response, *as perceived by police*.” [Emphasis in original.] *People v Cartwright*, 454 Mich 550, 559 (1997), citing *People v Olajos*, 397 Mich 629, 634 (1976).

## F. Consent

The consent to search exception allows a search and seizure when consent is “unequivocal, specific, and freely and intelligently given.” *People v Marsack*, 231 Mich App 364, 378 (1998). When determining the validity of a consent to search, the prosecution must show by clear and convincing evidence that, under the totality of the circumstances, the consent was freely and voluntarily given. *Schneckloth v Bustamonte*, 412 US 218, 248-249 (1973); *People v Chism*, 390 Mich 104, 123 (1973); *People v Shaw*, 383 Mich 69, 70 (1970); *People v Goforth*, 222 Mich App 306, 309 (1997). Because a consent to search involves the waiver of a constitutional

right, the prosecutor cannot discharge this burden by showing a mere acquiescence to a claim of lawful authority. *Bumper v North Carolina*, 391 US 543, 548-549 (1968). Where the defendant is under arrest at the time of the alleged consent, the prosecutor's burden is "particularly heavy." *People v Kaigler*, 368 Mich 281, 294 (1962).

A person may provide limitations on the scope of consent, and law enforcement officials may not exceed the scope of that consent when conducting the search. *People v Douglas*, 50 Mich App 372, 379-380 (1973). When determining the scope of consent, the standard is one of objective reasonableness, i.e., what would a typical reasonable person have understood the scope of the permission to search. *People v Frohriep*, 247 Mich App 692, 703 (2001).

A person may withdraw or revoke consent at any time. In *People v Powell*, 199 Mich App 492, 500-501 (1993), the Court of Appeals explained revocation of consent as follows:

"[W]e hold that a suspect may revoke his consent to search at any time. The revocation of the consent to search, however, does not invalidate the search conducted pursuant to the valid consent of the suspect before that consent was revoked. Any evidence obtained during the consensual portion of that search is admissible. However, once the consent is revoked, the police must stop the search unless continuing the search may be justified under some basis other than the suspect's consent. Finally, any evidence obtained during the consensual portion of the search may be considered in determining whether a continued search may be justified on some other basis."

A police tactic called "knock and talk" is sometimes used to obtain consent to search. The "knock and talk" tactic is where the police target a residence that they do not have probable cause to search, and then approach it and ask for consent to search. The Michigan Court of Appeals has upheld the constitutionality of this technique in *People v Frohriep*, 247 Mich App 692, 697-699 (2001), lv den 466 Mich 888 (2002).

## G. Inventory Search

The inventory search exception allows inventory searches of arrested persons or impounded vehicles without a warrant or probable cause if they are conducted in accordance with established departmental procedures and not used as a pretext for conducting a criminal investigation. *People v Toohey*, 438 Mich 265, 272, 276, 285 (1991). The purpose of an inventory search policy is to (1) protect an arrestee's property, (2) protect the police against claims for lost or stolen property, and (3) to reduce potential physical danger. *Id.* at 284-286.

The legality of an inventory search of a car following a defendant's arrest depends in part on whether the car was lawfully impounded. See *People v Poole*, 199 Mich App 261, 265 (1993) (upholding impoundment of car seized pursuant to department policy requiring impoundment after a person's arrest when no one can take the car). The prosecution must show that any impoundment is both necessary and reasonable, and conducted pursuant to departmental procedures. *People v Castle*, 126 Mich App 203, 207 (1983); *Toohey, supra*.

## 2.15 Issuance of Search Warrant in OUIL Cases

In drunk driving cases involving accidents, the driver's blood test results drawn for medical purposes are admissible in civil and criminal cases. MCL 257.625a(6)(e) provides:

"If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision. A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure."\*

See also *People v Kulpinski*, 243 Mich App 8, 26-27 (2000) (the statute makes disclosure of blood test results mandatory, "regardless of whether the person had been offered or had refused a chemical test").

MCL 257.625a(6) authorizes a court to order the taking of a person's blood sample when the person has refused a police officer's request to submit to a preliminary breath test (PBT), and when the officer has reasonable grounds to believe the person has committed any of the following offenses: operating under the influence of intoxicating liquor (OUIL), MCL 257.625(1); operating while impaired (OWI), MCL 257.625(3); OUIL/OWI causing death, MCL 257.625(4); OUIL/OWI causing serious impairment of a bodily function, MCL 257.625(5); any of the foregoing offenses if committed with a passenger under 16, MCL 257.625(7); operating a commercial vehicle, MCL 257.625a(5); zero tolerance (OUIL minor), MCL 257.625(6); negligent homicide; manslaughter (or murder) with a motor vehicle; and felonious driving.\*

\*The procedures detailed in this statute are constitutional under US Const, Am IV and Const 1963, art 1, § 11, and the Equal Protection Clauses of US Const, Am XIV and Const 1963, art 1, § 2. See *People v Perlos*, 436 Mich 305, 333-334 (1990).

\*The foregoing search warrant authority also applies to local ordinances substantially corresponding with MCL 257.625(1), (3), or (6); MCL 257.625a(5); and MCL 257.625m. MCL 257.625c(1).

If a court order required under MCL 257.625a is issued as a search warrant, the written search warrant may be issued in person or by any electronic means of communication by a judge or district court magistrate. MCL 780.651(3).\*

\*See Section 2.16 for a discussion of search warrants issued by electronic devices.

**Note:** Although MCL 780.651(3) permits a magistrate to issue a search warrant for required court orders under MCL 257.625a, the general authority for issuing a search warrant, in person or electronically, for other violations of law is limited to judges, unless otherwise provided by law. See MCL 780.651(3) and MCL 761.1(f).

Typically a police officer rather than a prosecutor drafts the affidavit in support of the request for a search warrant to obtain a blood test. Therefore, it is recommended that the affidavit and warrant be carefully examined by taking the following steps:

1. Determine that the person to be searched is described with particularity. US Const, Amend IV; Const 1963, art 1, § 11.
2. Determine that the sample to be seized is described with particularity. MCL 780.654(1).
3. Determine that a licensed physician, or a licensed nurse or technician operating under the delegation of a licensed physician and qualified to withdraw blood, will collect the sample requested by the officers. MCL 257.625a(6)(c).
4. Determine that the affidavit establishes reasonable grounds to believe that the person has committed either: OUIL, OWI, zero tolerance, OUIL/OWI causing death, OUIL/OWI causing serious impairment of bodily function, negligent homicide, manslaughter with a motor vehicle, and felonious driving. MCL 257.625a(6)(d).
5. If the affidavit is based on information supplied to affiant by a *named person*, such as another police officer, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information. MCL 780.653(a).
6. If the affidavit is based on information supplied to affiant by an *unnamed person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude:
  - a. That the unnamed person spoke with personal knowledge; and
  - b. That the unnamed person is credible, *or* that the information is reliable. MCL 780.653(b).

7. Swear affiant:

- a. Administer oath. MCL 780.651.
- b. Ask if averments in affidavit are true to best of affiant's information and belief. *Id.*
- c. Ask affiant to sign affidavit. See *People v Mitchell*, 428 Mich 364, 368 (1987) (search warrant based upon an unsigned affidavit is presumed invalid, but the prosecution may rebut the presumption by showing that the affidavit was made on oath to a magistrate).

8. Sign and date affidavit and search warrant. See *People v Barkley*, 225 Mich App 539, 545 (1997) (an unsigned search warrant is presumed invalid, but may the prosecution may rebut the presumption by showing that the magistrate or judge made a determination that the search was warranted and did intend to issue the warrant).

The acquisition of a search warrant for blood alcohol evidence in drunk driving cases removes the issue of consent, and thus makes the implied consent statute inapplicable. *People v Jagotka*, 232 Mich App 346, 353 (1998), rev'd on other grounds 461 Mich 274 (1999); *Manko v Root*, 190 Mich App 702, 704 (1999).

## 2.16 Submission of Affidavit and Issuance of Search Warrant by Electronic Device

MCL 780.651(2)(a)-(b) provide that an affidavit for a search warrant may be submitted by any electronic or electromagnetic means of communication if both of the following occur:

“(a) The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this section [MCL 780.651].

“(b) The affiant signs the affidavit. Proof that the affiant signed the affidavit may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit.”

Similarly, MCL 780.651(3) provides that a written search warrant may be issued by electronic or electromagnetic means of communication.

When an oath or affirmation is orally administered by electronic means of communication under MCL 780.651, the oath or affirmation is considered to be administered before the judge or district court magistrate. MCL 780.651(6).



When an affidavit for a search warrant is submitted, or a search warrant is issued, by electronic means of communication, “the transmitted copies of the affidavit or search warrant are duplicate originals of the affidavit or search warrant and are not required to contain an impression made by an impression seal.” MCL 780.651(7).

In cases involving electronically issued search warrants, the police officer or police department must receive proof that the issuing judge or district court magistrate has signed the warrant before its execution. MCL 780.651(4). Proof of such a signature may consist of an electronically transmitted facsimile of the signed warrant. MCL 780.651(4).

The validity of a search warrant issued by telephone and facsimile transmission has been upheld by the Michigan Court of Appeals. In *People v Snyder*, 181 Mich App 768, 769-770 (1989), the arresting officer sought a search warrant authorizing the withdrawal of a blood sample from a defendant arrested for drunk driving. The officer telephoned the judge at home, and then faxed a copy of the unsigned warrant documents to the judge’s home. The officer raised his right hand and telephonically swore to the affidavit. The officer then signed and faxed the affidavit to the judge, who in turn signed the warrant and faxed it to the officer. The Court of Appeals found the telephone/fax procedure valid because there was no statutory or constitutional impediment to the manner in which the warrant was obtained. *Id.* at 774. The Court also found that the telephonic communication link created enough of a presence to satisfy the oath requirement of the search warrant statute. *Id.* at 773-774.

## 2.17 Public Access to Search Warrant Affidavits

A search warrant affidavit contained in any court file or court retention system is a nonpublic record, except as provided in MCL 780.651(9). MCL 780.651(8). Under MCL 780.651(9), a search warrant affidavit becomes a public record on the 56th day following the issuance of the search warrant, or on August 1, 2002, whichever is later, unless a police officer or prosecutor, before either of those dates, “obtains a suppression order from a magistrate upon a showing under oath that suppression of the affidavit is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness.” The suppression order may be obtained ex parte in the same manner that the search warrant was issued. *Id.* Initial suppression orders expire on the 56th day after the order was issued; subsequent suppression orders, which may be obtained in the same manner as initial suppression orders, expire on the date specified in the order. *Id.*

The provisions in MCL 780.651(8)-(9) do not affect a person’s right to obtain a copy of a search warrant affidavit from the prosecuting attorney or law enforcement agency under Michigan’s Freedom of Information Act, MCL 15.231-15.246. MCL 780.651(9).

## **Part B — Checklists**

### **2.18 Checklist for Issuing Search Warrant**

### **2.19 Checklist for Issuing Search Warrant by Electronic Device**

## 2.18 Checklist for Issuing Search Warrant

- ☐ 1. Examine the affidavit and search warrant.
- ☐ 2. Determine that the person, place, or thing to be searched is described with particularity.
- ☐ 3. Determine that the property to be seized is described with particularity.
- ☐ 4. Determine that the property is a proper subject for seizure. See Section 2.6 for a list or property subject to seizure.
- ☐ 5. Determine that the affidavit establishes probable cause to believe that the articles to be seized may be found in the place to be searched.
- ☐ 6. If the affidavit is based on information supplied to the affiant by a *named person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information.
- ☐ 7. If the affidavit is based on information supplied to the affiant by an *unnamed person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude:
  - ☐ that the unnamed person spoke with personal knowledge; AND
  - ☐ that the unnamed person is credible OR that the information is reliable.
- ☐ 8. Swear affiant:
  - ☐ administer oath.
  - ☐ ask if averments in affidavit are true to best of affiant's information and belief.
  - ☐ ask affiant to sign affidavit.
- ☐ 9. Sign and date the affidavit and search warrant.
- ☐ 10. Retain original affidavit and original copy of search warrant.
- ☐ 11. Direct the police officer to leave a completed copy of the return to the search warrant at the place to be searched.
- ☐ 12. Ensure that a filled-out return to the search warrant is promptly filed with the court after the search warrant is executed.

## 2.19 Checklist for Issuing Search Warrant by Electronic Device

- ☐ 1. Upon receipt of a telephone call requesting that a warrant be issued, ask the police officer to read the affidavit and search warrant.
- ☐ 2. Determine that the person, place, or thing to be searched is described with particularity.
- ☐ 3. Determine that the property to be seized is described with particularity.
- ☐ 4. Determine that the property is a proper subject for seizure. See Section 2.6 for a list of property that may be the subject of a search warrant.
- ☐ 5. Determine that the affidavit establishes probable cause to believe that the articles to be seized may be found in the place to be searched.
- ☐ 6. If the affidavit is based on information supplied to the affiant by a *named person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude that the named person spoke with personal knowledge of the information.
- ☐ 7. If the affidavit is based on information supplied to the affiant by an *unnamed person*, determine that the affidavit contains affirmative allegations from which the magistrate may conclude:
  - ☐ that the unnamed person spoke with personal knowledge; AND
  - ☐ that the unnamed person is credible OR that the information is reliable.
- ☐ 8. Swear affiant:
  - ☐ orally administer oath.
  - ☐ ask if averments in affidavit are true to best of affiant's information and belief.
  - ☐ ask affiant to sign affidavit.
- ☐ 9. Sign and date the affidavit and search warrant and FAX them to affiant.
- ☐ 10. Direct the police officer to leave a completed copy of the return to the search warrant at the place to be searched.
- ☐ 11. Ensure that a filled-out return to the search warrant is promptly filed with the court after the search warrant is executed.